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In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH DAZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his sentence was based on improper criteria.

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846 (Count 1); possession of marijuana and methaqualone with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 4); and importation of marijuana and methaqualone, in violation of 21 U.S.C. 952(a), 960 and 18 U.S.C. 2 (Count 5). He was sentenced to consecutive terms of five years' imprisonment on each count, a lifetime special parole term, and a fine of $15,000 on each count. The court of appeals affirmed (Pet. App. 1a-17a).

The evidence at trial, discussed at length in the opinion of the court of appeals (Pet. App. 2a-6a), showed that between November 1977 and November 1978 petitioner was a member of an extensive conspiracy to import large quantities of marijuana into New York from Colombia. In February 1978, petitioner on behalf of the smugglers purchased a tug boat named the "Bill Mather" for $59,000. In April 1978, using a false name, he arranged for the boat to be repaired. The smugglers then used the "Bill Mather" to escort a trawler that was loaded with 23 tons of Colombian marijuana and one-half million methaqualone tablets to a marina in Queens, New York. Both vessels were seized by the Coast Guard as the conspirators were unloading the illegal drugs (Tr. 123-134, 199-206, 306-396, 418-419, 452-467, 509-525, 545, 570-576).

Prior to petitioner's trial, government witnesses were repeatedly approached and intimidated. The week before trial began, a witness who was scheduled to testify against petitioner was instructed by one of petitioner's associates to testify "vaguely" and was promised that in exchange the conspirators would "take care of her" (Tr. 386-388, 480-483). During trial, the government's main witness against petitioner's co-defendant was murdered (Pet. App. 6a).[1]

At petitioner's sentencing hearing, the district judge found that petitioner was a member of an international gang of drug smugglers, some of whose members had murdered the government witness (S. Tr. 8-18).[2] He also noted that petitioner had not cooperated with the government.

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[1]The circumstances surrounding the death of this witness are described in *United States* v. *Mastrangelo*, 662 F. 2d 946, 947-950 (2d Cir. 1981), cert. denied, No. 81-1549 (May 17, 1982).

[2]"S. Tr." refers to the transcript of the sentencing hearing held on June 5, 1981.

The judge stated that he intended to impose a heavy sentence on petitioner to deter others from interfering with witnesses, from associating with those who do, and from joining gangs like the one to which petitioner belonged (S. Tr. 8-18).

2. Petitioner claims (Pet. 5-13) that the district court abused its discretion by imposing a sentence based on impermissible criteria, *i.e.*, the court considered crimes committed by others and focused solely on the deterrent effect of the sentence, while disregarding all other considerations, including petitioner's potential for rehabilitation. There is no merit to these claims.

It is well settled that the district court has wide discretion in imposing a sentence upon a convicted defendant, and that a sentence imposed by the court, if within statutory limits, is generally not subject to review. *Roberts* v. *United States*, 445 U.S. 552, 556 (1980); *United States* v. *Tucker*, 404 U.S. 443, 446-447 (1972); *Williams* v. *New York*, 337 U.S. 241, 246-247, 250-252 (1949). Petitioner's sentence was within the permissible statutory maximum, and in light of his extensive involvement in a large-scale criminal organization that dealt in tons of illegal drugs worth millions of dollars and that used threats and deadly force to silence witnesses, it cannot be said that the district court abused its discretion in sentencing petitioner.

Contrary to petitioner's assertion (Pet. 7-13), the court did not fail to consider individual factors, including petitioner's potential for rehabilitation, in determining his sentence. While the court stated (S. Tr. 9) it was sentencing petitioner "solely" for deterrence, an examination of the full transcript of the sentencing hearing reveals that the court, after weighing all the relevant factors, concluded that punishment of the petitioner and deterrence of others militated against a lenient sentence in this particular case. The court stated (*id.* at 9-10) (emphasis added):

> This defendant joined an international gang, which turned out to have murderers as part of it. They murdered. The gang murdered a witness during the course of the trial. He [petitioner] has to take the risk of joining a gang of murderers and he will be sentenced as a member of a gang with international drug smugglers and murderers * * *. *Under those circumstances I don't view rehabilitation as a substantial factor.*

By dealing severely with petitioner, the district judge stated (S. Tr. 13) that he intended to discourage others from joining "gangs of importers of narcotics, and after the trial is commenced or prosecutions are commenced, from interfering with witnesses."

Punishment and deterrence have long been viewed as legitimate goals of sentencing. *Williams* v. *New York, supra,* 337 U.S. at 248-249 n.13. In imposing sentence a district judge, under appropriate circumstances, may weigh these factors more heavily than a defendant's potential for rehabilitation. *United States* v. *Hedman,* 630 F. 2d 1184, 1201 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981); *United States* v. *Moore,* 599 F. 2d 310, 315 (9th Cir. 1979), cert. denied, 444 U.S. 1024 (1980); *United States* v. *Miller,* 589 F. 2d 1117, 1138-1139 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979).[3] Petitioner's role in the drug smuggling

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[3]Petitioner's reliance on *United States* v. *Wardlaw,* 576 F. 2d 932 (1st Cir. 1978), and *United States* v. *Cavazos,* 530 F. 2d 4 (5th Cir. 1976), is misplaced. The judge in *Wardlaw* failed to take the defendant as an individual into account in imposing sentence. He sentenced a 23-year-old medical student who had been a courier for some narcotics dealers to ten years in prison. The government had recommended a four-year term, arguing that a more severe sentence would be unnecessary and inconsistent with previous sentences the judge had given in similar cases. The judge said his sentence was designed to force those who ran drug smuggling operations to become the smugglers themselves so they might be more easily apprehended. The court of appeals

conspiracy was extensive. Furthermore, he never cooperated with the government's investigation of the drug smuggling, nor with its efforts to apprehend the gang members who had intimidated and murdered witnesses. See *Roberts* v. *United States, supra,* 445 U.S. at 557-558 ("Few facts available to a sentencing judge are more relevant" to the question of a convicted defendant's potential for rehabilitation than his failure to assist the government in its criminal investigation); *United States* v. *Miller, supra,* 589 F. 2d at 1139 ("Consideration of failure to cooperate with authorities is certainly germane to an evaluation of a defendant's attitude toward society"). Given these considerations, the court did not err in minimizing the weight given petitioner's potential for rehabilitation in determining his sentence.

Petitioner also contends (Pet. 5-7) that he was improperly sentenced for a crime he did not commit. The district judge, however, expressly stated that he was not sentencing petitioner for the murder of the witness: he assumed that petitioner did not know of or approve of the murder (S. Tr. 12). And as petitioner concedes (Pet. 5), the court has wide discretion as to the type of information it may consider in imposing a sentence upon a convicted defendant. 18 U.S.C.

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found this theory questionable and ruled that while a sentencing judge may consider general deterrence as a factor in imposing sentence, he may not fail to weigh also the defendant's individual situation. As we have shown, the sentencing judge in petitioner's case did not fail to consider all the appropriate factors, including rehabilitation; he simply concluded that, given the ruthlessness of the gang in whose operations petitioner had participated, deterrence of others weighed most heavily. As the *Wardlaw* court said, this is permissible; the sentencing court must consider " 'the deterrent value of a jail sentence * * * and other important goals such as the offender's rehabilitation. Having done so, the district judge must finally decide what factors, or mix of factors, carry the day' " (576 F. 2d at 938). Likewise in *Cavazos*, and unlike the present case, the trial judge made it clear he had a fixed sentencing policy regarding drug cases; the court of appeals reversed because the judge had clearly refused to individualize the defendant's sentence.

3577; *Roberts* v. *United States, supra,* 445 U.S. at 556; *United States* v. *Tucker, supra,* 404 U.S. at 446. Petitioner does not challenge the accuracy of the judge's conclusion that members of the gang that petitioner had voluntarily joined and assisted murdered the witness. Cf. *Townsend* v. *Burke,* 334 U.S. 736, 741 (1948) (sentence reversed not because of its severity or because of the type of information upon which it was based, but rather because the sentencing information was "extensively and materially false"). Consequently, it was not error for the court here to consider the acts of petitioner's co-conspirators and the nature of that conspiracy in determining his sentence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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